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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000308-001 DT 08/20/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
K. Waldner
Deputy

BRANDI SULLIVAN

BRANDI SULLIVAN
16219 N 88TH AVE
PEORIA AZ 85382

v.

TWILA JESSE (001)

TWILA JESSE
750 W PEORIA
PHOENIX AZ 85029

REMAND DESK-LCA-CCC
SURPRISE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CV12–00063.

Plaintiff-Appellant Brandi Sullivan (Plaintiff) appeals the Surprise Municipal Court's determination removing the minor children from the Injunction Against Harassment (IAH) Ms. Sullivan obtained. Plaintiff contends the trial court erred and that Kelly Sullivan and Defendant both committed perjury when they testified. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On February 21, 2012, Plaintiff-Appellant received an Injunction Against Harassment. In requesting the IAH Plaintiff—in her Petition—claimed Defendant stalked her, followed her, and verbally assaulted her. Plaintiff also claimed her minor children were frightened by the confrontation. More specifically, Plaintiff alleged Defendant attempted to follow her home on February 20, 2012. Plaintiff also claimed Defendant threatened to "kick my ass" in October, 2011. The trial court signed the IAH and included the two minor children—Cooper and Brody Sullivan—on the IAH which had a no contact order. Defendant was served with the IAH the day it was issued. The same day—February 21, 2012,—Defendant filed a Request for Hearing claiming the accusations were false and also filed for her own IAH against Plaintiff. The trial court set a combined hearing for February 28, 2012, at 1:30 p.m.

At the hearing[1] Kelly Sullivan—Ms. Sullivan's estranged spouse and boyfriend to Ms. Jesse—was the only non-party witness.[2] Ms. Sullivan was the first person to testify.[3] She said that on Feb. 28, 2012, at approximately 6:55 P.M., she noticed a white vehicle with dark tinted windows but was unable to identify the driver.[4] She said the driver circled her vehicle twice. Thereafter—and because she was concerned—she tried to get behind the vehicle to see the license plates but the vehicle sped off onto 107th Avenue.[5] Ms. Sullivan indicated she returned to the parking lot. She testified that when her husband arrived with their children he told her that she would be arrested for following his girlfriend.[6] Ms. Sullivan stated this showed it was Ms. Jesse in the parking lot, but added she had never seen Ms. Jesse or her vehicle prior to the incident.[7] Ms. Sullivan said her kids were crying and afraid.[8] Ms. Sullivan added Defendant came back to the parking lot and squealed her tires.[9]

Ms. Sullivan testified Ms. Jesse threatened her through a telephone conversation Ms. Jesse had with Kelly Sullivan. She said Ms. Jesse apparently said she would "kick my ass" and Kelly Sullivan replied that Ms. Jesse should "come over and kick her ass."[10] Ms. Sullivan maintained (1) her children were very upset; and (2) she called 911.[11] The Sheriff's Department told her to call Peoria Police Dept.[12] because of the parking lot location and the Peoria Police Dept. suggested she obtain an IAH.[13] Ms. Sullivan continued that she—and her children—were fearful of Ms. Jesse and Ms. Jesse is a police officer.[14] Ms. Sullivan concluded her testimony by speaking about an officer going to her home and attempting to contact her but said she did not answer the door.[15] The trial court reminded Ms. Sullivan she was only to speak about incidents on her IAH petition and said Ms. Sullivan had not included anything about an officer going to her home on her petition.[16] Ms. Sullivan rested her case.

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[1] Audio recording, bench trial, February 28, 2012, at 1:35:29–42.
[2] *Id*. at 1:34:15–26.
[3] *Id*. at 1:38:38.
[4] *Id*. at 1:38:51–59.
[5] *Id*. at 1:39:24–34.
[6] *Id*. at 1:39:34–48.
[7] *Id*. at 1:39:52–58.
[8] *Id*. at 1:40:01–06.
[9] *Id*. at 1:40:06–18.
[10] *Id*. at 1:40:45–55.
[11] *Id*. at 1:40:57.
[12] *Id*. at 1:41:03.
[13] *Id*. at 1:41:14.
[14] *Id*. at 1:42:24–32.
[15] *Id*. at 1:41:29–1:42:11.
[16] *Id*. at 1:42:12–20.

The trial court called Ms. Jesse to testify.[17] Ms. Jesse[18] testified about the February 20, 2012, events. She stated she was at the parking lot at the drop-off time because she had not yet met the children and Mr. Sullivan was preparing to introduce her to his children.[19] She said she pulled out and a car got right behind her and was following her when the driver of the other car rolled down the window, used an expletive, and threatened to kill her.[20] Ms. Jesse added she now knows the person who yelled was Ms. Sullivan because she (Ms. Jesse) has received many phone calls from Ms. Sullivan (1) saying Ms. Sullivan was going to "f-ing kill me;" and (2) including racial slurs.[21] Ms. Jesse said (1) she turned onto the first street to call Kelly; (2) Ms. Sullivan saw her; and (3) Ms. Jesse told Kelly that something needed to be done because Ms. Sullivan was chasing her through the neighborhood.[22] Ms. Jesse said Ms. Sullivan passed her and she was able to get the license plate on Ms. Sullivan's vehicle.[23]

Ms. Jesse also described the events following the child exchange. She testified she told Kelly to let Ms. Sullivan leave first but said that when she left the parking lot she saw Ms. Sullivan stopped on the side of the road.[24] Ms. Jesse said Ms. Sullivan pulled out in front of her and she could hear the children screaming so she called 911.[25] Ms. Jesse said the 911 operator had a deputy call her back. The deputy said he would go to the house and speak with Ms. Sullivan.[26] The deputy went to the home, but Ms. Sullivan refused to answer the door.[27] Ms. Jesse added she obtained an IAH against Ms. Sullivan because she received numerous calls and text messages containing racial slurs and threats.[28] Ms. Jesse rested.

The trial court called Kelly Sullivan.[29] He said he saw Ms. Jesse's vehicle about 1/2 miles south—by Butler. She was upset and called him.[30] He testified Ms. Jesse told him she was driving south when Ms. Sullivan came out of the parking lot and started chasing her.[31] He asked if she called the police and she replied affirmatively.[32] He pulled into the parking lot and began unloading the children while Ms. Sullivan was screaming at him.[33] He added the minor child—

[17] *Id*. at 1:42:47.
[18] *Id*. at 1:43:08.
[19] *Id*. at 1:43:48–53.
[20] *Id*. at 1:43:53–1:44:40.
[21] *Id*. at 1:44:40–49.
[22] *Id*. at 1:44:49–1:45:20.
[23] *Id*. at 1:45:31–38.
[24] *Id*. at 1:45:38–1:46:17.
[25] *Id*. at 1:46:17–32.
[26] *Id*. at 1:47:03–09.
[27] *Id*. at 1:47:10–28.
[28] *Id*. at 1:47:56–1:48:34.
[29] *Id*. at 1:49:27.
[30] *Id*. at 1:49:59–1:50:06.
[31] *Id*. at 1:50:21–27.
[32] *Id*. at 1:50:27–20.
[33] *Id*. at 1:50:36–42.

Cooper—began crying and telling Ms. Sullivan to "shut up because she was being stupid."[34] Ms. Jesse pulled into the parking lot while Mr. Sullivan was on the phone with her and she told him she was coming into the parking lot. Ms. Sullivan began following her.[35] The trial court asked Mr. Sullivan if the parties were divorced and he replied they were waiting until May when they should be finally divorced.[36]

The trial court inquired about parenting arrangements. The trial court addressed Ms. Sullivan and asked if she wanted to respond to the testimony she heard. Ms. Sullivan asserted the statements made by Ms. Jesse were not accurate and the parties never directly "spoke words" to each other.[37] Ms. Sullivan denied ever saying "I'm going to f-ing kill you" to anyone.[38]

Ms. Jesse was asked if she wanted to add anything. She testified she had repeatedly received phone calls, e-mail, and text messages and had to have Ms. Sullivan's phone blocked so she could not call her phone.[39] Ms. Sullivan admitted to getting Ms. Jesse's phone number in October.[40] Ms. Jesse provided copies of the text messages to the court but Ms. Sullivan said the messages were inaccurate.[41] Ms. Sullivan said some of the messages were sent in October when she learned of the affair between Ms. Jesse and Mr. Sullivan.[42] Ms. Sullivan did not deny using racial slurs but maintained she did not threaten to kill Ms. Jesse.[43]

The trial court asked Ms. Sullivan about parenting issues and she said (1) Mr. Sullivan had abuse issues; (2) the parties were ordered to attend parenting classes; and (3) Mr. Sullivan was strongly encouraged to attend individual therapy from the class.[44] She added Mr. Sullivan was not allowed to be alone with the children until he successfully went through parenting counseling.[45] The trial court explained it was interested in determining the Superior Court's orders about the children so the trial court did not override anything done at the Superior Court.[46] Ms. Sullivan repeated the children were very afraid of Ms. Jesse.[47] The trial court queried if the

[34] *Id*. at 1:50:43–47.
[35] *Id*. at 1:50:47–1:51:46.
[36] *Id*. at 1:52:36–1:53:14.
[37] *Id*. at 1:58:46–59.
[38] *Id*. at 1:59:16–18.
[39] *Id*. at 1:59:52–2:00:16.
[40] *Id*. at 2:00:48.
[41] *Id*. at 2:02:10–2:03:20.
[42] *Id*. at 2:05:55–2:06:09.
[43] *Id*. at 2:06:05–12.
[44] *Id*. at 2:06:48–2:07:08.
[45] *Id*. at 2:07:08–34.
[46] *Id*. at 2:11:25–40.
[47] *Id*. at 2:13:32–37.

children met Ms. Jesse and Ms. Sullivan affirmed they had not met her but that Mr. Sullivan had shown them pictures of her.[48]

Mr. Sullivan was recalled. The trial court asked him if Ms. Sullivan's statement that he was on the phone with Ms. Jesse and told Ms. Jesse to "come beat my ass" in front of the children was true. Mr. Sullivan denied that this was true.[49] Mr. Sullivan stated he started speaking with Ms. Jesse on the way to the parking lot exchange point and it took about 30 seconds to get there.[50] He said he was speaking with Ms. Jesse while Ms. Sullivan was retrieving the children from his vehicle.[51] He said that was "the 9-11 conversation."[52] Mr. Sullivan then said he told the parenting counselor that Ms. Sullivan had stated "her kids will never be around a nigger" and added the statement "was a fact."[53] Mr. Sullivan said his only restriction as far as the children were concerned was that he could not leave the state.[54]

The trial court upheld the Jesse IAH.[55] The trial court also upheld the Sullivan IAH but removed the minor children from the order.[56]

Ms. Sullivan provided the appellate court with a copy of a 7 minute and 15 second recording of the parking lot incident. This recording was not introduced at the hearing and is an *ex parte* recording. This Court cannot consider any evidence that was not first presented at the trial court.

Plaintiff filed a timely appeal and Defendant responded. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Parties Properly Present Their Issues On Appeal.

Both Plaintiff and Defendant failed to properly present their issues on appeal. Appeals from a justice or municipal court determination are governed by the Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) which mandates the form for a proper appellate memorandum. Rule 8(a)(3) SCRAP—Civ. states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

[48] *Id*. at 2:13:37–42:14:27.
[49] *Id*. at 2:15:35–42.
[50] *Id*. at 2:16:04–09.
[51] *Id*. at 2:16:21–31.
[52] *Id*. at 2:16:36.
[53] *Id*. at 2:16:56–2:17:17.
[54] *Id*. at 2:18:01–10.
[55] *Id*. at 2:21:11–15.
[56] *Id*. at 2:21:55–2:22:52.

Both Plaintiff and Defendant failed to include any citation to the record or any citation to authority. They also failed to specifically explain the legal issues they addressed. Instead, Plaintiff just asserted she disagreed with the trial court's judgment and believed Defendant and her witness lied under oath. Defendant disagreed. Merely mentioning a claim is insufficient. "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The appellate court is "not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate a party's claim," *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984). Furthermore, unless there is fundamental error, allegations that lack specificity or reference to the record usually do not warrant consideration on appeal. *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977). Taken together, the two appellate briefs pose no more than a "She said, she said" controversy where one party alleged perjury and the other denied that either she—or her witness—lied under oath.

Both parties appeared *pro se* at both the trial and appellate levels. However, one's *pro se* appearance does not excuse the failure to conform to mandated rules. When individuals represent themselves, those persons are held to the same standard as a lawyer. In *In re Marriage of Williams*, 219 Ariz. 546, 200 P.3d 1043 ¶ 13 (Ct. App. 2008) the Arizona Court of Appeals held:

> Parties who choose to represent themselves "are entitled to no more consideration than if they had been represented by counsel" and are held to the same standards as attorneys with respect to "familiarity with required procedures and . . . notice of statutes and local rules." A party's ignorance of the law is not an excuse for failing to comply with it.

[Citations omitted.] Similarly, in *Higgins v. Higgins*, 194 Ariz. 266, 279, 981 P.2d 134, 138 (Ct. App. 1999) the Court ruled:

> One who represents herself in civil litigation is given the same consideration on appeal as one who has been represented by counsel. She is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer.

[Citations omitted.] Accord, *Kelly v. NationsBanc. Mortg. Corp*., 199 Ariz. 284, 287 ¶ 16, 17 P.3d 790, 793, ¶ 16 (Ct. App. 2001).

Plaintiffs' memorandum is just her assertion that she believed Defendant and her witness lied. Essentially, she (1) asked this court to review the evidence as presented to the trial court and come to a different conclusion and (2) asked this Court to consider evidence that was not

introduced at trial. This Court will not—absent fundamental error[57]—consider new evidence on an appeal. *State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995). This Court finds no fundamental error. Furthermore, as will be seen in the following section, it is not the function of the appellate court to rehear cases.

Defendant's memorandum contains similar errors. As occurred with Plaintiff's memorandum, Defendant's memorandum does not provide (1) legal authority or (2) factual citations to the record, and is little more than a statement of disagreement with Plaintiff's position.

B. Did The Trial Court Abuse Its Discretion In Removing The Minor Children From The IAH.

Trial court decisions to grant or deny Injunctions Against Harassment are reviewed for an abuse of discretion, *LaFaro v. Cahill*, 203 Ariz. 482, 485 ¶ 10, 56 P.3d 56, 59 (Ct. App. 2002). Reviewing courts will review cases alleging an abuse of discretion in the light most favorable to sustaining the trial court's ruling *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (Ct. App. 1992). To determine if the trial judge abused his discretion, this Court must determine if Plaintiff presented sufficient evidence to prove—by a preponderance of the evidence—that Defendant committed two or more acts of harassment against the minor children.[58]

The parents have a contentious relationship. However, an Injunction Against Harassment is a civil—and not a family court—action, and this Court is limited to reviewing if the trial court abused its discretion in modifying the Injunction. Equally important is the standard that an appellate court (1) is not a second bite at the apple to see if another court would rule differently and (2) does not re-weigh the evidence to determine if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2 1185, 1189 (1989). Instead, the appellate court is limited to reviewing the evidence to determine if Plaintiff presented sufficient evidence for the trial court to sustain the Injunction. In addressing the question of sufficiency of the evidence, the Arizona Supreme Court said the following:

> We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

[57] *See State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) where the Arizona Supreme Court defined fundamental error as "error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial. [Citations omitted.]

[58] The trial court sustained Ms. Jesse's IAH against Ms. Sullivan and Ms. Sullivan's IAH against Ms. Jesse. Neither party is contesting those IAHs.

State v. Bearup, 221 Ariz. 163, 211 P.3d 684 ¶ 16 (2009) (citations omitted). In this case, the trial court was presented with conflicting evidence in that Ms. Sullivan asserted Ms. Jesse harassed Plaintiff and the children but Defendant denied doing so. More specifically, Plaintiff asserted (1) Defendant's conduct in the Safeway parking lot was offensive; (2) Defendant frightened one or both children in the aftermath of the incident; and (3) Defendant threatened Plaintiff on an earlier occasion. While both Ms. Sullivan and Ms. Jesse presented testimony about the relationship between the two of them, Ms. Sullivan did not support her claim that the children were frightened by Ms. Jesse's actions. Ms. Sullivan agreed (1) the children had not met Ms. Jesse and (2) would not have recognized Ms. Jesse at the time of the February 20, 2012, incident. Ms. Sullivan told the trial court it was not possible to see who was driving because Ms. Jesse's car had tinted windows. Thus, while Ms. Sullivan testified the children were upset, she failed to demonstrate their distress resulted from Ms. Jesse's actions. Adult altercations can be upsetting to children and these children apparently witnessed a vociferous dispute between their parents. Because they did not know Ms. Jesse and had not met her, they had no independent knowledge about who was involved in the incident. Since the children did not know who was involved, it is likely that any concern would have arisen because one of the adults told the children they should be alarmed. That is not the same as needing protection. Ms. Sullivan did not demonstrate the children were at risk and did not provide the trial court with any parenting time orders indicating the children were to be restricted in their contact with their father or his friends. The trial court heard the evidence. From the presented testimony, it is clear the parties have different versions of the encounter. Therefore, the evidence in this case conflicts. In addressing the role of the appellate court when reviewing conflicting evidence the Arizona Supreme Court held:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Here, the trial court had the authority to decide the facts. Absent compelling proof as to how the trial court erred, this Court must sustain the trial court's factual determination. The trial court had the opportunity to see the parties and witnesses and to evaluate their testimony. These are

"procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge." This Court concludes the trial court correctly resolved this case.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Surprise Municipal Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the Surprise Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Surprise Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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